

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED
STATES DEPARTMENT OF JUSTICE REVISED MODEL CERCLA SECTION
122(h)(1) CASHOUT AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES**

January 8, 2004

[NOTE: This revised model supersedes the “Model CERCLA Section 122(h)(1) Cashout Agreement for Ability to Pay Peripheral Parties” that was issued as Appendix B to the September 30, 1998 “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority.”]

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR ABILITY TO PAY PERIPHERAL PARTIES**

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**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR ABILITY TO PAY PERIPHERAL PARTIES**

IN THE MATTER OF:)	AGREEMENT
)	
Site Name])	U.S. EPA Region ____
[City, County, State])	CERCLA Docket No. ____
)	
[Name of Settling Party])	PROCEEDING UNDER SECTION
SETTLING PARTY)	122(h)(1) OF CERCLA
_____)	42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D [insert reference to any internal Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [check with DOJ contact to determine appropriate DOJ official].

2. This Agreement is made and entered into by EPA and [insert name] (“Settling Party”). Settling Party consents to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] (“Site”) located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA has reviewed the Financial Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Party has limited financial ability to pay for response costs incurred and to be incurred at the Site.

8. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

9. This Agreement shall be binding upon EPA and upon Settling Party and its [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

10. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make a cash payment to address its alleged civil liability for the Site as provided in the Covenant Not to Sue by EPA in Section VIII, subject to the Reservations of Rights by EPA in Section IX.

V. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. “Agreement” shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. “Day” shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.]

____. “Fair Market Value” shall, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, mean the price at which the Property would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. In the event of a transfer by foreclosure, “Fair Market Value” shall mean the amount obtained at the foreclosure sale. In the event of a transfer by a deed or other assignment in lieu of foreclosure, “Fair Market Value” shall mean the balance of Settling Party’s mortgage on the Property at the time of the transfer.]

e. “Financial Information” shall mean those financial documents identified in Appendix ____.

f. “Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.¹

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.]

____. “Net Sales Proceeds” shall mean the total value of all consideration received by Settling Party for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) less i) the balance of Settling Party’s mortgage on the Property, ii) closing costs limited to those reasonably incurred and actually paid by Settling Party associated with the

¹ The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

Transfer of the Property, and iii) federal and state taxes owed on the proceeds. Settling Party shall provide EPA and the State with documentation sufficient to show the total value of all consideration received by Settling Party for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) at the time of each Transfer, the amount of the proceeds of the Transfer, and the amounts corresponding to items i) through iii) above. This documentation shall include, but not be limited to, the report of an appraisal paid for by Settling Party, performed by an appraiser satisfactory to the Parties, upon appraisal assumptions satisfactory to the Parties. The documentation must also include, either as part of the report or separately, 1) a tax statement showing the assessed valuation of the Property for each of the three years immediately preceding the Transfer, and 2) a schedule showing all outstanding indebtedness on the Property.]

g. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

h. "Parties" shall mean EPA and Settling Party.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used. Modify definition if property to be sold is not part of the Site.] [__. "Property" shall mean that portion of the Site that is owned by Settling Party as of [insert date]. The Property is located at [insert address] in [insert City, County, State], and is designated by the following property description: _____."]

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

j. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

k. "Settling Party" shall mean [insert name].

l. "Site" shall mean the ____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "generally shown on the map included in Appendix ____" or "generally designated by the following property description: _____."]

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.] [__. "Transfer" shall mean each sale, assignment, transfer or exchange by Settling Party (or its successors or heirs) of the Property, or any portion thereof, or of the entity owning the Property, where title to the Property (or any portion or interest thereof) or to the entity owning the Property i) is transferred and Fair Market Value is received in consideration, or ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on

the indebtedness secured, in whole or in part, by the Property, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.]

m. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

12. **[NOTE: Use this first Paragraph 12 when the Agreement requires one lump-sum payment.]** Within 30 days after the effective date of this Agreement as defined by Paragraph 32, Settling Party shall pay to the EPA Hazardous Substance Superfund \$ _____ [, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment]. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund
[Insert Regional Superfund lockbox number and address]

At the time of payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

12. **[NOTE: This alternative Paragraph 12 may be used when the Agreement includes an installment payment plan. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is a defined term.]** Settling Party shall pay to the EPA Hazardous Substance Superfund the principal sum of \$ _____, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the effective date of

this Agreement as defined in Paragraph 32. The first payment of \$_____ shall be due within 30 days of the effective date of this Agreement. Subsequent payments of \$_____ shall be due on [insert due dates for all subsequent payments or, *e.g.*, “January 1 of each year thereafter until all payments have been made.”] Settling Party may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

[NOTE: The following language should be used if each payment is above \$25,000.]

Payment shall be made by Electronic Funds Transfer (“EFT”) in accordance with instructions to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action.

[NOTE: The following language may be used if each payment is below \$25,000.] Payment shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

At the time of each payment, Settling Party shall also send notice that such payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

13. The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under either Paragraph 12 may be deposited in the Hazardous Substance Superfund or may be deposited in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”).² The Agreement should include clear instructions indicating which portion of the payment is to be deposited in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 12 as written, 100% of the payment will be deposited in a special account. The following

² When PRPs are performing the response action at the Site, payments may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

[If the entire payment will be deposited by EPA in the EPA Hazardous Substance Superfund:]

“The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount to be paid by Settling Party pursuant to Paragraph 12, [‘\$____’ or ‘____%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund], and [‘\$____’ or ‘____%’] shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[NOTE: If Settling Party has a claim relating to the Site for contractual indemnification, the negotiating team should consider whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery. The negotiating team should also request and review copies of any applicable insurance policies and consult with Headquarters about possible approaches for recovery under such policies.]

[NOTE: The following optional paragraph may be included when appropriate if the Settling Party is the Site owner. It may also be used when appropriate for recovery of proceeds from the sale of real property which is not part of the Site.] [____. Payment of Proceeds of Sale of Property. Settling Party agrees that it will not sell, assign, transfer or exchange the Property except by means of a Transfer. **[NOTE: If Settling Party is obligated to attempt to sell the Property as a condition of this Agreement insert, “Settling Party shall use its best efforts to Transfer the Property within ____ [days/months] of the effective date of this Agreement.”]**

a. In addition to the payment[s] made under Paragraph 12 [insert reference to any other payment provisions], Settling Party shall pay to EPA ____% [if potential recovery may exceed total amount sought from Settling Party, insert “or \$____, whichever is lesser,”] of the Net Sales Proceeds of the Transfer of the Property. Payment shall be made within ____ [e.g., 15] days of the effective date of the Transfer of the Property.

b. Payment shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

Settling Party shall send notice that payment has been made in accordance with Paragraph 12 above, and the payment shall be deposited by EPA in accordance with Paragraph 13 above.

[NOTE: If the deposit instructions in Paragraph 13 do not apply to this payment, included alternative instructions here.]

c. At least 30 days prior to any such Transfer, Settling Party shall notify EPA of the proposed Transfer, which notice shall include a description of the property to be sold, the identity of the purchaser, the terms of the Transfer, the consideration to be paid, and a copy of the Transfer agreement. The proposed sales price must be at least equal to the Fair Market Value of the Property based upon an appraisal obtained within 1 year of the Transfer. Settling Party shall notify EPA of the completion of the Transfer within 10 days of the date of closing and shall include with such notification a copy of the closing binder, including final executed documentation for the conveyance and a work sheet setting forth the Net Sales Proceeds and the amount payable to EPA.

d. In the event of a Transfer of the Property or any portion thereof, Settling Party shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement, except if EPA and Settling Party modify this Agreement in writing.] **[NOTE: If Settling Party is not obligated to attempt to sell the Property as a condition of this Agreement insert, "Nothing in this Paragraph obligates Settling Party to Transfer the Property or any portion thereof."]**

[NOTE: If financial circumstances exist that would justify inclusion of additional conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets other than the Site or other real property, such a provision may be included here.]

VII. FAILURE TO COMPLY WITH AGREEMENT

14. **[NOTE: Use this Paragraph 14 when the Agreement requires one lump-sum payment.]** Interest on Late Payments. If Settling Party fails to make any payment required by Paragraph 12 [also reference any other payment provisions] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. **[NOTE: Use this alternative Paragraph 14 when the Agreement includes an installment payment plan.]** If Settling Party fails to make any payment required by Paragraph 12 by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received. [If other payment provisions are included, insert, "If Settling Party fails to make any payment under Paragraph(s) __ by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment."]

15. Stipulated Penalty.

a. If any amounts due under Paragraph 12 [also reference any other payment provisions] are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$ ____ per violation per day that such payment is late.

[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Party does not comply with [reference sections containing non-payment obligations], Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$ ____ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # ____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

c. At the time of each payment, Settling Party shall send notice that such payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall identify the Region and Site-Spill ID # ____ and the EPA Docket Number for this action.

d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert “or performance”] is due [if non-payment obligations are included, insert “, or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with any term or condition of this Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Party's payment of stipulated penalties shall not excuse Settling Party from payment as required by Paragraph 12 [also reference any other payment provisions] or from performance of any other requirements of this Agreement.

[NOTE: If Settling Party is a Site owner, insert the following Section.]

[____. RELEASE OF NOTICE OF FEDERAL LIEN]

[____. Within ____ days after EPA receives [if installment payment plan insert "the final"] payment required by Paragraph 12 of this Agreement [or "within ____ days after closing" if Agreement provides for sale of site or other real property], EPA shall file a Release of Notice of Federal Lien in the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. The Release of Notice of Federal Lien shall release the Notice of Federal Lien filed on [insert date and file number of lien] and shall not release any other lien or encumbrance which may exist upon the Property.]

VIII. COVENANT NOT TO SUE BY EPA

18. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,]³ with regard to the Site.⁴ With respect to present and future liability, this covenant shall take effect upon receipt by EPA of [for lump sum payments, insert "all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] [for installment payment plans, insert "the first payment required by Section VI, Paragraph 12 (Payment of Response Costs)."] This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement[.] [for installment payment plans, continue sentence with "including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Party. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other

³ Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

⁴ This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

IX. RESERVATIONS OF RIGHTS BY EPA⁵

19. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

[NOTE: The precise terms of Subparagraph (d) may need to be changed if Settling Party has a continuing relationship with the Site.] d. liability, based upon Settling Party's ownership or operation of the Site, or upon Settling Party's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Settling Party; and

- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

20. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by Settling Party, or the financial certification made by Settling Party in Paragraph 30(b), is false or, in a material respect, inaccurate.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

⁵ On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in an ability to pay agreement in addition to the other reservations of rights included in this Section. Because use of this reopener presents case-specific drafting issues, Regions should contact OECA when using this alternative.

X. COVENANT NOT TO SUE BY SETTLING PARTY

22. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site⁶ or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.⁷

Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 19(c) - (e), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Settling Party agrees not to assert any claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person [, except as provided in Paragraph ____.] **[NOTE: Use bracketed language if Agreement includes a**

⁶ If the Agreement does not cover the Site as a whole, the reference to “the Site” here and in Subparagraphs 22(b) and (c) should be narrowed to conform to the intended scope of the Agreement.

⁷ The settlement should release any claims by the Settling ATP Party against the United States related to the Site. Where the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues either in the ATP settlement or in a future settlement. Settlement of any federal liability in the ATP settlement will require additional revisions to this document.

provision (following Paragraph 13) on future recovery from insurance or contractual indemnification claims concerning the Site.] This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Except as provided in Paragraph 24, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Agreement. The “matters addressed” in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Party coming within the scope of such reservations.⁸

27. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been addressed in this Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA set forth in Section VIII.

[__ . SITE ACCESS]⁹

⁸ This definition of “matters addressed” assumes that this Agreement is designed to resolve fully Settling Party’s liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

⁹ Include this Section if 1) access to the Site may be needed and 2) the Site owner is Settling Party or Settling Party controls access to the Site or to any other property to which access is needed. If Settling Party will need to provide institutional controls as part of a response action, include such a provision here. Model language may be found in Section IX of the

(continued...)

[__]. Commencing upon the effective date of this Agreement, Settling Party agrees to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Party to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]
- [f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Party or its agents, consistent with Section ____ (Access to Information).]

____. Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

[_. ACCESS TO INFORMATION]¹⁰

[__ . Settling Party shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as “records”) within its possession or control or that of its contractors or agents relating to activities at the Site [if needed, include “or to the implementation of this Agreement”], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

____ . Confidential Business Information and Privileged Documents.

⁹(...continued)
Revised Model RD/RA Consent Decree (June 12, 2001, or more recent update).

¹⁰ Include this Section only if Settling Party has been or will be involved in cleanup efforts at the Site or if Settling Party may possess information that may assist the Agency in its cleanup or enforcement efforts.

a. Settling Party may assert business confidentiality claims covering part or all of the records submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Party that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Party.

b. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege in lieu of providing records, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

[__. RETENTION OF RECORDS]¹¹

[__. Until __ years after the effective date of this Agreement, Settling Party shall preserve and retain all [records] [if Access to Information is not used, insert “records, reports, or information (hereinafter referred to as “records”)] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

__. After the conclusion of the document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records, and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with

¹¹ See n.10 *supra*.

the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (e.g., company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record will be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.]

XIII. CERTIFICATION

28. Settling Party hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the state or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for documents or information regarding the Site and Settling Party's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927;

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Party executes this Agreement; and

c. fully disclosed the existence of any insurance policies that may cover claims relating to cleanup of the Site.

XIV. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party.

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

As to Settling Party:

[Insert name and address]

XV. INTEGRATION/APPENDICES

30. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement:

Appendix A is a list of the financial documents submitted to EPA by Settling Party; etc.

VI. PUBLIC COMMENT

31. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 31 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Party]

By: _____
[Name]

[Date]

U.S. Environmental Protection Agency

By: _____

[Name]

[Date]

U.S. Department of Justice

By: _____

[Name]

[Date]

[Insert title of appropriate DOJ official]

Environment and Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530

By: _____

[Name]

[Date]

Attorney

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

P.O. Box 7611

Washington, DC 20044-7611